MOTION FILED

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No. 93-1121

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

ED PLAUT, ET AL.,
Petitioners,

vs.

SPENDTHRIFT FARM, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

MOTION AND BRIEF AMICUS CURIAE OF MICHAEL B. DASHJIAN IN SUPPORT OF PETITIONERS

MICHAEL B. DASHJIAN
Law Offices of Michael B. Dashjian

3161 Bechelli Lane
Suite 202-B
Redding, CA 96002
Telephone: (916) 221-8900

Attorney for Amicus Curiae

42 pp

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.4 of the Rules of this Court, MICHAEL B. DASHJIAN, a member of the Bar, respectfully moves this Honorable Court for permission to file a brief *amicus curiae* in the above-captioned action, on his own behalf. The proposed brief *amicus curiae* is printed with and follows this motion.

In support of this motion, applicant states the following:

1. This brief is proffered to the Court in order to bring relevant matter to its attention that has not been and apparently will not be brought to its attention by the parties, or by other *amici*.

2. Applicant is a private practitioner in Northern California, exclusively in the area of appeals and appellate-related matters. He has prior tenure as a Senior Attorney in the Division of Enforcement of the Securities and Exchange Commission in Washington, and also has previously represented major securities clients.

3. Applicant has substantial expertise in the particular area of securities statutes of limitation, from his securities law experience and from a detailed law review article dealing with the Lampf case and section 27A of the Exchange Act. Dashjian, "The Prospective Application of Judicial Legislation," 24 Pac. L.J. 317 (1993) [lead article].

4. Many of the points in the brief are adapted from applicant's article, although they have been rewritten to address concisely specific issues raised by this case and the grant of certiorari. Other parts of the brief have been newly written solely for this case, based on applicant's significant background in the area and in separation of powers issues.

5. Applicant seeks to file this brief purely as a friend of the Court and not on behalf of any institutional interests. Because of his unusually extensive work and expertise in the area, applicant is in a particularly good position to provide the Court with relevant matter that would not otherwise be brought to its attention.

6. In order to ensure that this brief conforms with Rule 37.1 of this Court, applicant has reviewed the briefs filed by counsel for the respondents and the United States in Morgan Stanley & Co. v. Pacific Mutual Life Ins. Co., No. 93-609 (U.S. May 23, 1994), both of whom will apparently be filing briefs in support of the petitioners here as well. The main points herein were not made in those briefs, and the analyses are substantially different (although the final conclusions of constitutionality are

obviously the same). Furthermore, the main points and analyses of *amicus curiae* were not addressed in the opinion of the Sixth Circuit in this case.

7. In particular, the points made by applicant are distinct and unique in the following manner:

a. The separation of powers argument in Part II proposes a single, simple approach, without need for exceptions, that would harmonize 200 years of separation of powers jurisprudence. No brief in this case or in Morgan Stanley (and no commentator, to applicant's knowledge) has articulated it. It is derived in part from a note by Hart & Wechsler on United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

In the view of applicant, this analysis is important and merits this Court's consideration. Applicant argues that the Court of Appeals' opinion is inconsistent with other constitutional powers, such as the Presidential pardon power, and is inconsistent with this Court's separation of powers jurisprudence. Applicant's argument is based on interlinked principles from this Court's opinion in United States v. Klein, and Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792). It draws on this Court's recent decision in Robertson v. Seattle Audobon Society, ___ U.S. ___, 112 S.Ct. 1407 (U.S. March 25, 1992), which is said to illustrate applicant's approach in a different factual context. It also discusses how this Court's decision in United States v. Sioux Nation, 448 U.S. 371 (1980), and other cases cited by the Court of Appeals, fit well into the analysis espoused in this brief.

b. The due process analysis in Part III is derived from applicant's law review article. The issue raised, that there is no constitutional infirmity with Section 27A(b) because the District Court's original Lampf dismissal denied the shareholders due process of law by arbitrarily depriving them of a hearing on their claims, was not addressed by the Court of Appeals' opinion in this case or by any party.

c. The analyses in Part I(B), made to show that section 27A(b) does not interfere with "vested rights," are also derived from applicant's law review article and are very different from the arguments made on behalf of the respondents in Morgan Stanley. Applicant argues that the running of the Lampf limitations period conferred no "vested rights" because there was no legislative intent that it do so, and the District Court's judgment based on Lampf also conferred no "vested rights" because it did not adjudicate the merits of any claim and had no *res judicata* effect. These analyses have not been proffered by any party and were not addressed by the Court of Appeals' opinion.

d. Pages 1 and 2 of Part I(A), part of the discussion of why section 27A(b) has a rational basis, do overlap briefly with the briefs on behalf of respondents in *Morgan Stanley*. The remainder of Part I(A), centering around the principle that Congress can "overrule" decisions of this Court in the field of statutory interpretation, makes a point that has not been made by any party. The argument in this Part is also part of foundation for the separation of powers analysis in Part II.

8. Based on the above, applicant believes this brief does bring relevant matter to the attention of this Court which would not otherwise be brought to its attention by the parties. Applicant believes the analyses herein would be of substantial benefit to the Court in resolving the important issues raised in this case.

9. Applicant files this motion because not all parties to the case have consented to the filing of this brief.

The following parties have consented: Intervenor - United States of America; Respondents - Spendthrift Farm; Gibson, Dunn & Crutcher/Francis Wheat(*); Deloitte & Touche.

The following parties have declined consent: Petitioner - Plaut et al.; Respondents - Bateman Eichler; Norman Owens/American Int'l Bloodstock Agency(*).

[(*) refers to parties jointly represented by the same counsel.]

For the foregoing reasons, applicant respectfully asks that his motion to file a brief *amicus curiae* be granted.

I declare under penalty of perjury of the laws of the United States that the facts set forth herein are true and accurate to the best of my personal knowledge.

Dated this 20th day of July, 1994.

Respectfully submitted,

MICHAEL B. DASHJIAN
3161 Bechelli Lane Suite 202-B
Redding, California 96002
Telephone: (916) 221-8900
Counsel for Applicant

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INTEREST OF AMICUS CURIAE

Amicus curiae practices privately in Northern California, exclusively in the area of appeals and appellate-related matters. He has a significant background in securities litigation, including prior representation of major securities clients and tenure as a Senior Attorney in the Division of Enforcement of the Securities and Exchange Commission in Washington. He has substantial expertise in the area of securities statutes of limitation, culminating in a detailed 1992 article dealing with Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, ___ U.S. ___, 111 S.Ct. 2773, 115 L.Ed.2d 321 (U.S. June 20, 1991), and section 27A of the Exchange Act. Dashjian, "The Prospective Application of Judicial Legislation," 24 Pac. L.J. 317 (1993) (hereinafter "Prospective Application").

This brief is adapted in part from "Prospective Application." While many of the views of *amicus curiae* are set forth in the article, this brief should obviate the need to dissect an 80-page article with a frequently theoretical focus for the portions most applicable to this case. In addition, other portions of this brief have been newly written for the case now before this Court. The portions of "Prospective Application" that have been adapted for this brief have also been further refined or rewritten, based on the Court of Appeals' opinion and this Court's grant of certiorari.

This brief is being filed by *amicus curiae* purely as a friend of the Court. Because of his unusually extensive work and expertise in the area, *amicus curiae* is in a particularly good position to provide the Court with relevant matter that would not otherwise be brought to its attention.

SUMMARY OF ARGUMENT

Section 27A(b) does not violate the Due Process Clause of the Fifth Amendment. Rationally based retrospective legislation is permissible, and this legislation was rationally based in Congress's desire to "overrule" the perceived unfairness of retroactive application of Lampf. Section 27A(b) also does not interfere with "vested rights." A litigant does not obtain a "vested right" in the running of an ordinary limitations period such as that created in Lampf. Furthermore, there is no "vested right" in a judgment which is not rendered on the merits and has no *res judicata* effect, such as the District Court's original judgment on limitations grounds.

Section 27A(b) does not violate the separation of powers. Two centuries of separation of powers jurisprudence may be reconciled in simple principles of universal applicability: Congress can exercise the legislative

power; it cannot exercise the judicial power; and its legislation cannot be independently unconstitutional on other grounds. The Court of Appeals and the respondents have erroneously equated a federal court judgment with the "practical effect" of a federal court judgment. Congress cannot legislate to modify or review a judgment, because that would be an exercise of the Article III "judicial power" which rests solely in the federal courts. But Congress can change the "practical effect" of a judgment—change rights and obligations decreed by the judgment—provided the judgment remains intact, and Congress's action is not "independently unconstitutional on other grounds." That is what Congress did in passing section 27A(b).

Finally, section 27A(b) violates no constitutional provision because the District Court's original judgment itself was a deprivation of due process, based on prior holdings of this Court. This Court has never addressed squarely whether retroactive application of the Lampf time bar would violate the Due Process Clause. It should do so here, either to avoid reaching an issue of the constitutionality of an Act of Congress, or to hold section 27A(b) constitutional on both grounds in the grant of certiorari.

ARGUMENT

I. Section 27A(b) Does Not Violate The Due Process Clause Of The Fifth Amendment To The U.S. Constitution

A. The Statute Is Rationally Based

Section 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1, comports with substantive principles of due process of law requiring that governmental action be nonarbitrary and rationally based.

Every court that had addressed the issue had held this Court's decision in James B. Beam Distilling Co. v. Georgia, ___ U.S. ___, 111 S.Ct. 2439, 115 L.Ed.2d 481 (U.S. June 20, 1991), required retroactive application of Lampf's new limitations period, even if that barred claims which were timely when filed. See "Prospective Application," 24 Pac. L.J. at 345-346 & n. 162, and cases cited. Congress apparently agreed. See 137 Cong. Rec. H11811 (daily ed. Nov. 26, 1991) (letter of Rep. Dingell.) This concerned Congress, largely because actions against prominent people linked to the savings and loan crisis could have been subject to dismissal under the new Lampf rule. Id. S13707 (daily ed. Nov. 21, 1991) (statement of Sen. Riegle). The FDIC was also concerned that cases against alleged wrongdoers in the S & L scandals would be jeopardized. Id. S18625 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan).

Congress's solution was, in effect, to allow this Court's one and three-year limitations period to stand, but to overrule the perceived retroactive application of Lampf. 137 Cong. Rec. S17356 (daily ed. Nov. 21, 1991) (statement of Sen. Domenici); id. S17306 (daily ed. Nov. 21, 1991) (statement of Sen. Riegle); id. H11811-12 (daily ed. Nov. 26, 1991) (letter of Rep. Dingell); id. S18624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan). There is nothing arbitrary or irrational about that.

It is true that section 27A was retroactive legislation, since it was signed in December 1991 but only applied to litigants who had claims pending before June 20, 1991. However, Congress may apply its statutes only to a particular class of litigants, and may legislate retroactively. Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729-30 (1984); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17-18 (1976). As long as there is a rational basis for both the legislation and the manner in which it is applied, and no other constitutional infirmity, Congress may apply economic legislation as it wants. Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. at 729-30; Usery v. Turner Elkhorn Mining Co., 428 U.S. at 17-18. Here, as to actions under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), "Lampf changed the rules in the middle of the game for thousands of fraud victims who already had suits pending." 137 Cong. Rec. S18623 (Nov. 27, 1991) (statement of Sen. Bryan). This is a rational basis for changing the rules back.

It does not matter that Congress passed a statute in order to negate the perceived unfairness of decisions of this Court. Congress can "overrule," alter or modify a federal court statutory interpretation that is contrary to the will of Congress, as this Court has acknowledged. "[O]verruling or modification [of a prior Supreme Court decision interpreting a federal statute] should be left to Congress. . . . [W]hen the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time. . . ." United States v. South Buffalo Ry. Co., 333 U.S. 771, 774-75 (1948); accord, e.g., Illinois Brick Co. v. Illinois, 431 U.S. 720, 734 n.14 (1977). (For recent examples, see, e.g., Ardestani v. INS, ___ U.S. ___, 112 S.Ct. 515, 518, 116 L.Ed.2d 496 (U.S. Dec. 10, 1991); Johnson v. Home State Bank, ___ U.S. ___, 111 S.Ct. 2150, 2154 n.4, 115 L.Ed.2d 66 (U.S. June 10, 1991).) Congress is in the best position to determine its own intent, so Congress should and does have the last word if it wants it.

Lampf, read in conjunction with Beam, generally has been interpreted to have two elements: (1) a determination of what statute of

limitations would be applied in section 10(b) cases, and (2) a determination that this statute of limitations would be applied retroactively. The Congressional response, section 27A, acquiesced in the limitations period, but nullified the retroactive effect. This was a rational response based on a policy determination that even if this Court did not necessarily contravene Congressional will in implementing the new limitations period, it did so in making that limitations period retroactive. Congress could rationally determine that parties should not have their federal antifraud claims eliminated on technical grounds through no action or inaction of their own.

Section 27A was also consistent with Congress's long-standing policy for new statutes of limitation, including ones in economic legislation. That policy has been to implement new statutes of limitation prospectively. E.g., Act July 7, 1955 section 4, 69 Stat. 283 (new four-year Clayton Act period effective six months after enactment); 7 U.S.C. § 25(d), P.L. 97-444, 96 Stat. 2322 (new limitations period for Commodity Exchange Act actions not to affect causes of action accruing prior to statute's enactment). This is also a policy that has been imposed on Congress by this Court. See Sohn v. Waterson, 84 U.S. (17 Wall.) 596, 598-99 (1873); Union Pacific Ry. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 202 (1913).

Congress's most recent declaration of this policy was contemporaneous with Lampf itself. When Congress enacted a catch-all four-year statute of limitations in December 1990, it made the limitations period prospective by applying it only to actions created after that date. 28 U.S.C. § 1658, P.L. 101-650, § 313(a). Congress viewed settling the expectations of parties as an essential purpose of a statute of limitations, and it did not want to impose a new limitations period retroactively because that might disrupt settled expectations. See H.R. Rep. No. 101-734, 101st Cong., 2d Sess., at 24, *reprinted in* 1990 U.S.C.C.A.N. 6802, 6870.

Thus, section 27A was based on rational policy that new limitations periods should not be applied retroactively, and that to so apply the Lampf would be unfair. This was an appropriate exercise of Congressional power.

B. The Statute Does Not Unconstitutionally Impair Private Property Rights

The portion of section 27A(b) which allows the revival of claims previously dismissed as time-barred does not impair "vested rights."

Preliminarily, the issue in this section should be addressed with precision. The United States, writing in Morgan Stanley & Co. v. Pacific

Mutual Life Ins. Co., No. 93-609 (U.S. May 23, 1994), questioned the use of the term "vested right," arguing that there is no such term in the Constitution. This argument is also supported by a decision of this Court:

> It is to be observed that the words "vested right" are nowhere used in the Constitution, neither in the original instrument nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the constitution.

Campbell v. Holt, 115 U.S. 620, 628 (1885).

It would thus be more precise for respondents to claim that a judgment on limitations grounds is constitutionally protected private property, and section 27A(b) violated the constitutional protection. And since the grant of certiorari extends only to whether section 27A(b) violates the Due Process Clause or the separation of powers, the only "vested rights" claim which could be made here would be that section 27A acted to take private property without due process of law.

Nonetheless, the term "vested rights" could be used as a shorthand for "constitutionally protected private property rights," and it appears this is what the Court of Appeals and the District Court meant by the term. Therefore, for the sake of simplicity and consistency, *amicus curiae* will use the term "vested rights" or "vested property rights" to refer to private property rights protected by the Fifth Amendment's Due Process Clause.

A "vested rights" argument could have merit in other situations involving the reopening of final judgments. If a private individual were paid a money judgment from an action in an Article III court, it is doubtful Congress could act to subject the judgment to relitigation. In such a case, the judgment may be a vested property right, which Congress cannot take away by legislation. See, e.g., Asiatic Petroleum Co. v. Insular Collector of Customs, 297 U.S. 666, 671 (1936); McCullough v. Virginia, 172 U.S. 102, 123 (1898). However, no vested rights are implicated in this case.

There are two possible "vested right" arguments which could be addressed to this case; one, that the mere running of the limitations period imposed by Lampf created a "vested right"; and two, that the District

Court's original judgment dismissing the shareholders' action on limitations grounds created a "vested right." They will be taken in turn.

1. The Running Of The *Lampf* Limitations Period Created No "Vested Rights"

Litigants objecting to "retroactive" limitations periods have sometimes asserted that the mere *running* of a statute of limitations creates "vested rights," and therefore that a Legislature may not constitutionally reinstate an action as to which a limitations period has already run.

Such claims, however, have been repeatedly rejected by this Court. Int'l Brotherhood of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229, 243-44 (1976); Chase Securities Corp. v. Donaldson, 325 U.S. 304, 315-16 (1945); Campbell v. Holt, 115 U.S. 620 (1885). These decisions refute any claim that respondents obtained "vested rights" from the mere running of the time period set forth by Lampf.[1]

In Chase Securities Corp. v. Donaldson, 328 U.S. at 312 n.8, and Int'l Brotherhood of Electrical Workers v. Robbins & Myers, 429 U.S. at 233, the defendants sought to use this Court's decision in William Danzer Co. v. Gulf & Ship Island Ry. Co., 268 U.S. 633 (1925), to claim Congress has no power to revive an action that was time-barred when filed. Danzer is no more applicable here than it was in Chase Securities and Robbins & Myers, since the limitations period in Lampf is not of the type in Danzer.

Danzer's limitations period was the less common one that extinguishes a liability when it runs, rather than merely denying a party his remedy. Danzer, 268 U.S. at 636; see, e.g., 1B J. Moore, Moore's Federal Practice, ¶ 0.409[6] at 334-35 (3d ed. 1988); Midstate Horticultural Co. v. Pennsylvania Ry. Co., 320 U.S. 356, 358-59 & n.4 (1943).[2]

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[1] A statute of limitations is generally an affirmative defense of a procedural bar that may be waived. See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 332 (1971); Helvering v. Newport Co., 291 U.S. 485, 488 (1943); Fed. R. Civ. P. 8(c).

[2] This type of limitations period is commonly found in actions over property, because of the importance of settling questions of title. Campbell v. Holt, 115 U.S. at 623-24. It is also found in suits against the Government, see, e.g., Becker Steel Co. v. Cummings, 296 U.S. 74, 84 (1935), since the Government cannot be sued without its specific consent, and a condition accompanying consent (such as a statute of limitations) must be strictly complied with. Soriano v. United States, 352 U.S. 270, 276 (1957).

It is true that if this type of time bar has run, retroactive application of a new limitations period may amount to a taking of property. This was the precise holding of Danzer, 268 U.S. at 636-37. The Danzer limitations period is one which either (a) is attached to a liability and specifically creates a finite term of its existence, or (b) is directed specifically to the liability, so as to warrant a conclusion that the statute qualifies the right. Chase Securities Corp. v. Donaldson, 325 U.S. at 312 n.8.

The Danzer principle, however, is based solely on legislative intent that the right is unenforceable after a specific time. The fact that a statute of limitations is part of the same Act as an underlying liability does not automatically make it a Danzer-type limitations period. Int'l Brotherhood of Electrical Workers v. Robbins & Myers, Inc., 429 U.S. at 243; Burnett v. New York Central Ry. Co., 380 U.S. 424, 427 n.2 (1965); Midstate Horticultural Co. v. Pennsylvania Ry. Co., 320 U.S. at 360. Danzer also does not automatically apply merely because the time bar in question is a nontollable "repose period," after which no action can be brought under any circumstances. See generally Int'l Brotherhood of Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) (rejecting Danzer analysis).

Since Danzer can only be invoked when there is a clear legislative intent to extinguish a right after a certain time, it cannot be invoked here. There is no legislative intent that the rights underlying the section 10(b) cause of action be extinguished after the running of Lampf's outer three-year bar. There is no legislative intent at all in this case, because neither the section 10(b) action nor its new time bar were created by a legislature.

Furthermore, this Court recognized in Lampf that Congress's usual intent on limitations questions such as these is to borrow state law. Lampf, 111 S.Ct. at 2778. It held, however, that the section 10(b) limitations period warranted judicial "interstitial lawmaking" based on considerations of "federal policies . . . and the practicalities of litigation." Id. There is no suggestion of Congressional intent to extinguish a right Congress did not create, based on a limitations period it also did not create, which was adopted as judicial policy 45 years after the right was first recognized.

2. The District Court's Original Dismissal Of Petitioners' Action On Limitations Grounds Created No "Vested Rights"

Nor did the District Court's original judgment dismissing the shareholders' action on limitations grounds create a "vested right" which was unconstitutionally taken away by section 27A(b).

Contrary to the Court of Appeals' opinion, Plaut v. Spendthrift Farm, Inc. 1 F.3d 1487, 1490 (6th Cir. 1993), there is no "vested right" in a judgment alone, without an adjudication on the merits.

Absent a statute or rule to the contrary, a judgment not on the merits is not an actual determination of a claim. Such a judgment is only a refusal to hear the claim, and thus may not bar subsequent actions. 1B J. Moore, Moore's Federal Practice (3d ed. 1988), ¶¶ 0.405[5] at 228, 0.409[1.-2] at 308, 0.409[6] at 338-39; Costello v. United States, 365 U.S. 265, 285-86 (1969) (want of prosecution); St. Romes v. Levee Steam Cotton-Press Co., 127 U.S. 614, 618-19 (1888) (want of indispensable parties); House v. Mullen, 89 U.S. (22 Wall.) 42, 46 (1874) (misjoinder); Miller v. United States Postal Service, 729 F.2d 1033 (5th Cir. 1984) (want of jurisdiction); see generally Hughes v. United States, 71 U.S. (4 Wall.) 232, 237 (1866). This rule has been used for dismissals on limitations grounds. Henson v. Columbus Bank & Trust Co., 651 F.2d 320, 325 (5th Cir. 1981); Jimenez v. Toledo, 576 F.2d 402, 404 (1st Cir. 1979); Warner v. Buffalo Drydock Co., 67 F.2d 540, 541-42 (2d Cir. 1933), cert. denied, 291 U.S. 678 (1934); Restatement (2d) Judgments § 19 comment f and Reporter's Notes; Restatement (2d) Conflict of Laws § 110 comments a, b.

Since subsequent actions may not be barred, there can be no "vested property right" in the original judgment not going to the merits.

The cases above are cases dealing with *res judicata*, but they demonstrate the point here, for the law of *res judicata* would be radically different than it always has been if respondents' argument were correct. Under respondents' apparent view, any judgment on any ground—even if not on the merits—supposedly creates "vested rights."

This view would lead to the conclusion that a second lawsuit can never be permitted to overcome the dismissal of an earlier lawsuit, because that would nullify the effect of the "vested rights" supposedly obtained through the final judgment dismissing the first lawsuit. In other words, all defendants in that situation would have a "vested right" in blocking adjudication of the plaintiff's underlying right, an absolute immunity from suit. All plaintiffs would be forever prohibited from pursuing their claims.

That is not the law. *Res judicata* has not barred subsequent actions following judgments that are not on the merits, even at common law. Haldeman v. United States, 91 U.S. (1 Otto) 584, 586 (1876). If an action is dismissed for failure to pay a filing fee, no one would question the defendant does not acquire absolute immunity, and the plaintiff can refile.

If an action is dismissed because it was filed in the wrong court, no constitutional rights are violated if the plaintiff refiles in the right one. Many states have "saving statutes" which authorize this type of result. See, e.g., Burnett v. New York Central Ry. Co., 380 U.S. at 431-32; Dunton v. County of Suffolk, 729 F.2d 903, 911 n.8 (2d Cir. 1984). Of necessity, such judgments by themselves create no property rights."[3]

Thus, the only way a judgment based on a statute of limitations could arguably create "vested rights" would be if it were a judgment on the merits. Here, the District Court's original judgment was not on the merits. As is discussed in Part I(B)(1) above, a statute of limitations is a mere procedural restriction, and a judgment based on a plea of limitations operates only to bar the remedy and does not extinguish the underlying right. Campbell v. Holt, 115 U.S. at 624-25, 628-29; see Sun Oil Co. v. Wortman, 488 U.S. 717, 725-26, 728-29 (1988). The argument that the Lampf statute of limitations extinguished the underlying right in this case was addressed in Part I(B)(1) above; suffice it to say it did not.

A *res judicata* analysis also highlights further the errors below. The Court of Appeals wrote: "[T]he very existence of this appeal suggests that

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[3] Federal Rule of Civil Procedure 41(a) further demonstrates this proposition. Rule 41(a), promulgated under the Rules Enabling Act, 28 U.S.C. § 2072, provides a plaintiff may file a voluntary dismissal without prejudice at any time before the defendant serves an answer or a motion for summary judgment. This permits the plaintiff to "reopen" the judgment of dismissal simply by filing another action, which would also militate against any argument that the first judgment created "vested rights" in favor of the defendant.

The Rules Enabling Act is part of the "long-recognized power of Congress to prescribe housekeeping rules for federal courts." Hanna v. Plumer, 380 U.S. 460, 473 (1965). Accordingly, "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself." Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825). Conversely, Congress has no authority to delegate powers that it cannot exercise itself. Since Congress has delegated powers resulting in the implementation of Rule 41(a), it must be able to exercise those powers itself. As a result, Congress must have every power to pass a statute allowing actions to be reopened in the same manner that Rule 41(a) permits, pursuant to the Congressional delegation in the Rules Enabling Act.

The Government made a similar argument below, based on Fed. R. Civ. P. 60(b). The Court of Appeals rejected it and distinguished Rule 60(b) by saying: "The question is not whether the courts may disturb final judgments, but whether Congress may disturb them. Plaut v. Spendthrift Farm, 1 F.3d at 1493 n.13 (emphasis in original). However, the proper analysis as to Rule 60(b) is the same as that above. Rule 60(b) exists by virtue of the Rules Enabling Act, and it too is part of Congress's power to prescribe housekeeping rules for the federal courts. The distinction drawn by the Court of Appeals is thus illusory.

defendants have not chosen to waive their defenses of res judicata with which the District Court vested them in dismissing the shareholders' claim as time barred." Plaut, 1 F.3d at 1498. The Court of Appeals apparently thought respondent's "vested right" was a *res judicata* defense in favor of the District Court's original judgment. That was in error, because as this section shows, the District Court's dismissal on limitations grounds did not adjudicate the merits.[4]

The principles discussed in this section are exemplified by Brent v. Bank of Washington, 35 U.S. (10 Pet.) 596 (1836). In Brent, the Bank had filed an untimely action on the decedent Brent's notes, and judgment was entered for Brent's executors based on the statute of limitations. Later, the executors, who held stock of the Bank, brought a bill in equity to transfer that stock to pay Brent's debts to the United States. According to the legally enforceable rules of the Bank, however, transfer of its stock was contingent on payment first of all outstanding debts to the Bank.

This Court held that although the Bank's action at law on the notes had been barred by a limitations judgment, the Bank still retained an equitable lien on the stock and could prevent the stock's transfer until all debts due the Bank were paid. It based its holding on the principle above, that the judgment based on the statute of limitations barred the Bank's remedy at law, but the debt remained as an unextinguished right which could still underlie property rights such as an equitable lien. Id. at 617-18.

This Court's holding in Brent would have been impossible if the original judgment on limitations grounds had created a "vested right," extinguishing Brent's debts and forever immunizing Brent's executors from any effort by the Bank to collect them. As the opinion makes clear, the original judgment had no such effect. It has no such effect here either.

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[4] Also illustrative of these principles is Freeborn v. Smith, 69 U.S. (2 Wall.) 160, 175 (1865):

> [I]t is hard to perceive what vested right the defendant in error had in having this case suspended between two tribunals, neither of which could take jurisdiction of it; or the value of such a right, if he was vested with it. If either party could be said to have a vested right, it was plaintiff in error . . . If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside, and the defendant is only claiming a vested right in a wrong judgment. "The truth is . . . there is no such thing as a vested right to do wrong . . . ."

In short, a judgment, without more, creates no "vested rights." There is no more in this case, however. The Court of Appeals' holding that the dismissal of the shareholders' claim on limitations grounds forever fixed the rights of the parties, Plaut v. Spendthrift Farm, 1 F.3d at 1498, is based on a faulty premise, that a limitations dismissal permanently fixes any rights at all. Like other procedural bars, it is a refusal to hear a claim, which may and usually does prevent assertion of that claim. However, a mere procedural refusal to hear a claim does not preclude an appropriate act that would permit the claim to be renewed or heard on the merits.

II. Section 27A(b) Does Not Violate The Separation Of Powers

Congress does not violate the separation of powers when it passes legislation authorizing the reinstatement of previously dismissed claims in a federal court, provided (1) it does not purport to modify or review the federal court's actual judgment; and (2) its action is not independently unconstitutional on other grounds. Since neither proviso applies here, section 27A(b) violates no separation of powers principles.

The inquiry for separation of powers questions is the extent to which section 27A(b) "prevents the [judiciary] from accomplishing its constitutionally assigned functions." Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977). Section 27A(b) does not do this at all. The simple governing principles, which reconcile 200 years of separation of powers jurisprudence from 1792 to 1992, are: The Legislature can exercise the legislative power; it cannot exercise the judicial power; and its legislation cannot be independently unconstitutional on other grounds.

A. Introduction: *Hayburn's Case*

The Court of Appeals' opinion was based on an erroneous extension of Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), far beyond the issue before the Justices who wrote on it, and far beyond the basic constitutional principles which those Justices—writing nearly contemporaneously with the ratification of the Constitution—sought to expound.

Hayburn's Case illustrates what no one would now question: Congress cannot confer jurisdiction on an Article III court so as to subject the court's judgments to nonjudicial review. Thus, in Hayburn's Case, the Justices agreed Congress could not grant jurisdiction in the federal courts while subjecting their judgments to review by the Secretary of War.

This principle was also illustrated in Gordon v. United States, 117 U.S. 697 Appx., 69 U.S. (2 Wall.) 561 (1865), in which Chief Justice Taney's opinion reiterated that a grant of "jurisdiction" was invalid when it provided a money judgment against the United States would not be paid until (and unless) an appropriation was estimated by the Secretary of the Treasury—a requirement of nonjudicial review. Other cases also illustrate the principle. In re Sanborn, 148 U.S. 222, 225-28 (1893); United States v. Ferreira, 54 U.S. (13 How.) 40, 46-47 (1851).[5]

Section 27A(b) was not a Congressional grant of jurisdiction that required nonjudicial review of judgments. When the District Court entered judgment against the shareholders in this case, section 27A did not even exist. The District Court's dismissal was no mere "recommendation"; it was a dismissal, legally binding on the parties to the litigation.

The principles of Hayburn's Case are not necessarily limited to prospective grants of jurisdiction authorizing nonjudicial review of federal court judgments. They may in some situations extend to *post hoc* legislation by Congress specifically authorizing review of a prior federal court judgment by a nonjudicial branch. In Hayburn's Case, the jurists in the Circuit Court for the District of New York (Chief Justice Jay, Justice Cushing and District Judge Duane) wrote: "[B]y the constitution, neither the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court." 2 U.S. at 414 n.*. If a District Court renders judgment that A is entitled to a certain payment from B, Congress cannot

[5] Many other Article III principles also emanate from Hayburn's Case, such as the prohibition against advisory opinions, the adverseness requirement, and others. The relationship of these principles to the separation of powers is beyond cavil, since all stem from the division of the branches under Articles I, II and III. Thus, for example, it might be said an Article III judgment is not subject to nonjudicial review because that would render it an advisory opinion. This discussion fairly encompasses all such related Article III principle; it is unnecessary to repeat it for all of them.

As it turned out, Hayburn's Case would not have involved a justiciable "case or controversy" even if the judgments of the federal courts had been final. United States v. Todd, summarized at 54 U.S. (13 How.) 40, 53 (U.S. 1794). That facet of the case is not relevant to this discussion.

then pass a special act permitting itself or the Executive to reexamine and readjudicate this judgment, and deeming the judgment null and void.[6]

A third important and related separation of powers principle arises out of this Court's decision in United States v. Klein, 80 U.S. (13 Wall.) 128 (1872). While Klein has in the past been controversial and often misinterpreted, on its face it fits neatly into the constitutional scheme of separation of powers and provides an essential adjunct to Hayburn's Case.[7]

The essence of Klein relevant to this discussion is that Congress is prohibited from exercising the "judicial power" in Article III "cases and controversies," or from impairing the judiciary's ability to exercise that power, which is the judiciary's exclusive constitutional function.

There were many ways Congress did this in Klein. For one, Congress impaired this Court's ability to interpret the Constitution, its paramount role in our tripartite system. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803). Based on its interpretation of Article II, this Court had already held the President had sole and absolute pardon power, and a claimant could rely on a pardon to prove loyalty. United States v. Padelford, 76 U.S. (9 Wall.) 531, 542-543 (1870) (citing Ex Parte Garland, 71 U.S. (4 Wall.) 333, 380 (1867) and Armstrong's Foundry, 73 U.S. (6 Wall.) 766, 769 (1868)). Congress's Act nullified this Court's interpretation

[6] The word "opinions" in the passage above from Hayburn's Case cannot be interpreted over-literally and out of context, to mean that Congress cannot pass an Act disagreeing with an opinion of a federal court. As has already been discussed above, ante Part I(A), Congress may pass a statute to correct an erroneous federal court interpretation of a prior statute. The passage above should be viewed in the context in which it was written; an "opinion" of the court referred to its final decision, a judicial decree.

[7] The Court of Appeals held there were no issues in this case arising from Klein. Plaut, 1 F.3d at 1497 n.14. In a narrow and technical sense, the Court of Appeals was correct; this case presents different facts from those in Klein, since section 27A(b) by its terms did not affect any pending case or controversy. However, as will be shown herein, Klein and this Court's most recent case respecting it, Robertson v. Seattle Audobon Society, ___ U.S. ___, 112 S.Ct. 1407, 118 L.Ed.2d 73 (U.S. March 25, 1992), provide very important guidance for resolving the issues in this Part. In many respects, this case follows directly from Robertson, since respondents' argument is essentially the same as that of the respondents in Robertson—with the exception that the respondents in Robertson were citing Klein based on the facts of that case, while respondents here have foregone Klein and are instead citing Hayburn's Case. See post, Part II(B)(2). As will be shown in this Part, for separation of powers purposes, Klein and Hayburn's Case stand for the same principles.

of Article II and its ability to apply that interpretation to Klein's case, which Congress cannot do. See United States v. Klein, 80 U.S. at 145.

Furthermore, by its Act, Congress participated in the exercise of the "judicial power" in a "case or controversy" and in fact directed how Klein's case was to be decided, which are also beyond the power of Congress. Congress made itself the ultimate adjudicator, and the judiciary was used for purposes other than exercising the judicial power to render a final decree, which is impermissible under Article III. See id., 80 U.S. at 146-47; United States v. Sioux Nation of Indians, 448 U.S. 371, 405 (1980).[8]

Hayburn's Case makes clear a nonjudicial branch cannot participate in any exercise of Article III "judicial power." There, the prohibited participation in the "judicial power" was Executive review of judgments. Similarly in Klein, this Court held Congress could not participate in an exercise of Article III "judicial power" in the adjudication of Klein's case.

Thus, the separation of powers doctrine of Hayburn's Case encompasses three propositions relevant here: (1) Congress cannot grant jurisdiction so as to subject judgments of a federal court to nonjudicial review; (2) Congress cannot subject a judgment of a federal court to

[8] This Court was certainly correct in holding that Congress directed how Klein's case and others were to be decided. The Court's obvious concern was that if in the exercise of its Article III judicial power, it applied the facts to the law and decided the claimant should prevail—which it obviously would have, based on Padelford—the Act then required it to dismiss the cause for want of jurisdiction. This in effect substituted Congress's will for this Court's judgment in an ongoing case or controversy, which is unconstitutional. See Klein, 80 U.S. at 146-47; United States v. Sioux Nation, 448 U.S. at 405.

More generally, if in any case subject to this Act of Congress, a federal court were to have relied on a pardon as the basis for a pardoned claimant's assertion of loyalty, then it was required to dismiss the claimant's case for want of jurisdiction. If it did not rely on the pardon, then the pardon was conclusive evidence of the claimant's disloyalty, and no judgment could be rendered for the claimant. In either case, the claimant lost. When Congress tells a federal court to decide a case by the law, "Heads we win, tails everyone else loses," it deprives the judiciary of the "judicial power," and simply arrogates to itself the power to make the relevant decision. See also Manley v. Georgia, 279 U.S. 1, 6 (1929).

In Klein's case, Congress not only took the power to make the decision from the federal courts, but the decision it made was independently unconstitutional on other grounds. Based on this Court's prior cases interpreting Article II, the Executive had the sole constitutional pardon power. However, the Act of Congress presumed to dictate the effect of a pardon and impair the Executive's sole discretion, which Congress could not do.

nonjudicial review after the fact; and (3) Congress cannot participate in the "judicial power" as to a "case or controversy," or impair the federal courts' ability to exercise the "judicial power" as to a "case or controversy."

These three propositions, put together, stand for one fundamental tenet: The judiciary exercises the whole Article III "judicial power" over "cases and controversies," and a nonjudicial branch can exercise no such "judicial power." In turn, the constitutional terms "judicial power" and "case or controversy" have been defined by this Court: "By those terms are intended the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy." Smith v. Adams, 130 U.S. 167, 173-74 (1889) (citing Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 819 (1824)).

However, it is Congress's prescribed function to legislate. U.S. Const., Art. I, § 1. Congress may change substantive law and create jurisdiction in the federal courts. As long as it does not do any of the things prohibited above, Congress can change substantive law or create jurisdiction in any way, if its action is not otherwise unconstitutional.

Congress can also change the law or create new law applicable to a case—even a pending case—and that change in law may well have a significant practical effect on a court's adjudication. See, e.g., Robertson v. Seattle Audobon Society, ___ U.S. ___, 112 S.Ct. 1407, 1413-14, 118 L.Ed.2d 73 (U.S. March 25, 1992); 149 Madison Avenue Corp. v. Asselta, 331 U.S. 795 (1947). But if there is no nonjudicial review of a federal court judgment, and no other Congressional impairment of the judicial power, and the action is not "independently unconstitutional on other grounds," a change in law is permissible whatever its "practical effect."[9]

[9] The term "independently unconstitutional on other grounds," used in this context, is borrowed from the commentary on United States v. Klein found in P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, The Federal Courts and the Federal System 316 (2d ed. 1973). See also In re Consolidated United States Atmospheric Testing Litigation, 820 F.2d 982, 992 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988). The analysis herein is fully consistent with this view of Klein, and actually appears to be a restatement of the same principles, applied across a broader range of separation of powers issues than the particular ones presented in Klein. Since it is the view of *amicus curiae* that the separation of powers principles illustrated by Klein follow directly from the general separation of powers principles in Hayburn's Case, the similarity of analysis is unremarkable.

B. The Proper Application Of *Hayburn's Case* To This Case

1. Introduction; Application Of Principles In Part II(A)

As this section will further show, Congress may enact legislation and create jurisdiction, even if its action has a "practical effect" on rights and obligations originally decreed by a prior federal court judgment—so long as (1) Congress's action is not "independently unconstitutional on other grounds," and (2) the prior federal court judgment is kept intact and unchanged, and is fully respected for all legal rights and obligations (if any) it still requires. The prior federal court judgment must be fully respected, for to do otherwise would be to subject it to impermissible nonjudicial review. But Congress can take a separate action that is *not* directed at the judgment itself; there is no separation of powers prohibition against legislation that may have the "practical effect" of changing rights and obligations previously defined by a federal court judgment.

To state the conclusion first, what Congress can do is exactly what section 27A(b) did. The District Court originally held on August 13, 1991 that under the law which existed at that time, the shareholders' claims were time-barred. It entered a decree dismissing the shareholders' action. Subsequently, Congress changed the law by eliminating the retroactive effect of the new time bar, by creating a right to a new adjudication for parties who had been retroactively affected by the new time bar.

That Act of Congress involved none of the separation of powers problems set forth above. Congress did not direct that the judiciary's judgments in past, pending or future actions would be submitted to it or the SEC for approval. Nor was section 27A(b) an adjudication of this particular case or any other case. Nor did it impair the judiciary's ability to exercise the "judicial power," as defined above, in any "case or controversy." Rather, all judgments by District Courts were kept intact. Congress passed no law stating, "Prior dismissals of section 10(b) actions under the Lampf time bar are hereby rendered null and void, and the District Courts shall decide their cases as if those dismissals did not exist."

Thus, Congress merely changed the law by providing for a second action, which it was empowered to do. It did not touch the original judgments. It passed a new law with a new limitations period (namely, the limitations period in effect when Lampf was decided), and it empowered federal courts to hear claims based on this new law. This is the essence of legislative power. And as discussed in Part I above, Congress violated no other constitutional provision in so doing.

2. The Erroneous "Practical Effect" Doctrine

This section further analyzes why there is no prohibition against legislation that may change the "practical effect" of a prior federal court judgment, but does not act to review the judgment itself, and is not "independently unconstitutional on other grounds." The analysis recognizes the difference between a judgment of a federal court and the "practical effect" of judgment of a federal court. This difference has not been recognized by those who have argued against section 27A(b)'s constitutionality, and the absence of such recognition is a source of error.

The Court of Appeals' decision, and other arguments claiming a separation of powers problem with section 27A(b), are necessarily grounded on the "practical effect" doctrine no matter how they are worded. For example, while the Court of Appeals referred loosely to a prohibition against "disturb[ing] final judgments," Plaut, 1 F.3d at 1493, 1498, it is unquestionable that section 27A(b) did not purport to act on the judgment of the District Court itself. Nothing in section 27A(b) refers to any judgment of a federal court in this case, any other case, or any set of cases.

Rather, section 27A(b) only changed the "practical effect" of the judgment of the District Court—namely, a refusal to hear the merits of the shareholders' claims. Thus, if there is a separation of powers problem in this case, it would have to be because the Constitution forbids a nonjudicial branch from taking action that would change the practical effect of a prior federal court judgment, by changing the rights and obligations of the parties which were decreed by that original judgment.

Nonjudicial branches of government are empowered to do things that have the "practical effect" of changing rights and obligations originally decreed by judgments of federal courts. A Presidential pardon (U.S. Const., Art. II, § 2, cl. 1) has an obvious "practical effect" of changing such obligations. This change is extremely significant; a pardon eliminates all adverse effects of a judgment of conviction, and voids any sentence or civil disability. Ex Parte Garland, 71 U.S. at 380.

Despite this significant "practical effect" on prior federal court judgments, the exercise of the pardon power does not mean the judiciary never validly exercised the Article III judicial power in the first place. Nor does it mean a federal court's prior final judgment is rendered nonexistent. Nor does it mean the Presidential pardon power is unconstitutional. It only means that after a valid exercise of Article III judicial power, another branch of Government did something *it* was constitutionally entitled to do.

The original judgment remains on the books unchanged, for whatever rights and obligations it still requires (whether or not there are any).

Similarly, if a federal court were to interpret a treaty in a manner that the Executive Branch and its treaty partner believed was inappropriate, the Executive and its partner would be empowered to negotiate an agreement repudiating the federal court interpretation, as long as it was not independently unconstitutional on other grounds. That does not mean the federal court did not exercise Article III jurisdiction in the first place, or that its exercise of Article III jurisdiction and final judgment became nullities *post hoc*. It means that after a valid exercise of Article III jurisdiction, another branch of government can do anything that is a proper exercise of *its* Constitutional powers, even if it has the "practical effect" of changing (even nullifying) rights and obligations originally decreed by a judgment. Again, the original judgment must remain intact, and there must be no other constitutional problem with the nonjudicial branch's action.

So it is with Congress. If a federal court errs in interpreting the will of Congress, then Congress can fix that error, as was discussed in Part I(A) above. If by so doing, Congress changes rights and obligations decreed by a prior federal court judgment, this is still permissible as long as Congress sticks to its constitutional function of legislation, does nothing to change the prior judgment itself, and violates no other constitutional norms. That does not mean the court never exercised jurisdiction in the first place, or that it did not issue a decree under its Article III powers. It only means Congress can act within its area of legislation in an otherwise constitutional manner, whatever the "practical effect" of its legislation may be. This is what Congress did in section 27A(b).

A judgment and the "practical effect" of a judgment are not the same thing. If nonjudicial review of a judgment is constitutionally forbidden, nonetheless, this Court has never established a doctrine in separation of powers jurisprudence giving constitutional significance to the "practical effect" of a judgment. The Court of Appeals' opinion and respondents' arguments are without support in this Court's opinions.

Had there been any doubt as to whether a "practical effect" doctrine ever existed, it would have been scuttled by this Court's decision in Robertson v. Seattle Audobon Society, ___ U.S. ___, 112 S.Ct. 1407, 118 L.Ed.2d 73 (U.S. March 25, 1992). For in Robertson, the Ninth Circuit's decision was another exposition of the "practical effect" doctrine. The Ninth Circuit held Congress violated the separation of powers

principles of United States v. Klein because the **"clear effect"** of subsection (b)(6)(A) was to perform judicial functions under Article III, by directing the courts to reach a specific result and find certain facts. Seattle Audobon Society v. Robertson, 914 F.2d 1311, 1316 (9th Cir. 1990) (boldface added). This Court rejected the "clear effect" approach, holding instead that Congress simply created a new law through legislation, which it was empowered to do. Robertson v. Seattle Audobon Society, 112 S.Ct. at 1413-14.[10]

Robertson further shows there is no separation of powers issue based on whether a nonjudicial branch has done something which has a "practical effect" on rights and obligations originally decreed by a federal court judgment. Rather, the sole separation of powers issue is whether a nonjudicial branch has exercised judicial powers it is constitutionally unauthorized to exercise; namely, permitting nonjudicial review of or otherwise partaking in a federal court adjudication. The principle particularly applicable to this case is that Congress could not review a judgment (the District Court's original judgment) because that would be an exercise of the "judicial power," and the original judgment must always remain intact. Subject to these vital provisos, the nonjudicial branches can change rights and obligations of parties to the judgment if such an action is not independently unconstitutional on other grounds, which Congress did here.

3. *Sioux Nation* And *Wheeling & Belmont Bridge*

The key difference between Congress authorizing nonjudicial review or modification of a federal court judgment (impermissible), and legislatively changing rights and obligations of litigating parties from those originally decreed by a federal court judgment (permissible if not independently unconstitutional on other grounds), is further shown by other separation of powers cases discussed by the Court of Appeals: United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), and Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1836).

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[10] Even this Court's interpretations of the Constitution are not completely final in terms of their "practical effect." For if this Court interprets the Constitution in a manner that is considered objectionable, the Constitution provides for the ultimate remedy—amend the Constitution. That the Constitution can be amended to change the "practical effect" of decisions of this Court does not mean the Court never exercised jurisdiction in the first place, or the Legislatures of 38 states acted unconstitutionally in ratifying the amendment.

The Court of Appeals distinguished Sioux Nation and Wheeling & Belmont Bridge by asserting "exceptions" to its "practical effect" interpretation of the separation of powers. Sioux Nation, it was said, was distinguishable from this case because it involved "public rights" and not "private rights." Plaut v. Spendthrift Farm, 1 F.3d at 1498. Wheeling & Belmont Bridge was distinguished from this case on the ground that it involved injunctive relief and not legal relief. Plaut, 1 F.3d at 1494-95.

The constitutional doctrine of separation of powers does not have to be a general rule of thumb punctuated by *ad hoc* exceptions for "public rights," "equitable relief," and whatever else might seem appropriate at a given moment. The guiding principles established by our Framers are much simpler and universally applicable: The Legislature can exercise the legislative power; it cannot exercise the judicial power; and its legislation cannot be "independently unconstitutional on other grounds."

Thus, in Sioux Nation, Congress eliminated the "practical effect" of the prior final judgments by an Act that maintained those judgments intact, and was independently constitutional because it emanated from Congress's power to pay the Nation's debts. Id., 448 U.S. at 397-401. In Wheeling & Belmont Bridge, Congress eliminated the "practical effect" of the prior final judgment by an Act that maintained that judgment intact, and was independently constitutional because it emanated from Congress's power to regulate interstate commerce. Id., 59 U.S. at 431. And so in this case, Congress eliminated the "practical effect" of the prior final judgment by an Act that maintained that judgment intact, and was independently constitutional for the reasons set forth in Part I above—namely, the retrospective legislation did not deprive any party of private property rights or otherwise violate any party's right to due process of law.

More particularly, in Sioux Nation, this Court considered a "practical effect" objection essentially identical to that here. "The objection would take the form that Congress, in directing the Court of Claims to reach the merits of the Black Hills claim, ***effectively** reviewed and reversed that Court's 1975 judgment* that the claim was barred by res judicata, *or its 1942 judgment* that the claim was not cognizable under the Fifth Amendment." Id., 448 U.S. at 392 (boldface and italics added).

This Court held that when Congress enacted the 1978 Act, it "neither brought into question the finality of that court's [the Court of Claims'] earlier judgments, nor interfered with that court's judicial function in deciding the merits of the claim." United States v. Sioux Nation, 448

U.S. at 406-07. In other words, in Sioux Nation, the Act of Congress did not affect either the 1942 judgment or the 1975 judgment; it did not address those judgments at all. As a result, there was no separation of powers problem, whatever the Act's "practical effect."

While the Act of Congress would still have been prohibited had it been "independently unconstitutional on other grounds," it was not; that was the importance of Congress's constitutional power to pay the Nation's debts. Congress was thus empowered to waive the *res judicata* effect of any prior judgment and provide for a new litigation, so long as it did not attempt to review the prior judgments or affect the judiciary's ability to exercise fully the "judicial power" in the new litigation, neither of which it did. Accord Pope v. United States, 323 U.S. 1, 9-12 (1944).

The inapplicability of the "practical effect" doctrine was also shown in an early Court of Claims cited by this Court in Sioux Nation, Nock v. United States, 2 Ct. Cl. 451 (1867). Nock further shows the important difference between a judgment and the "practical effect" of a judgment. This Court's discussion of Nock illustrates the principles relevant here:

> In Nock, the Court of Claims was confronted with the precise question whether Congress invaded judicial power when it enacted a joint resolution, 14 Stat. 608, directing that court to decide a damages claim against the United States "in accordance with the principles of equity and justice," even though the merits of the claim previously had been resolved in the Government's favor. The court rejected the Government's argument that the joint resolution was unconstitutional as an exercise of "judicial powers" because it had the ***effect** of setting aside the court's prior judgment*. Rather, the court concluded:
>
>> "It is unquestionable, that the Constitution has invested Congress with no judicial powers; it cannot be doubted that a legislative direction to a court to find a judgment in a certain way would be little less than a judgment rendered directly by Congress. But here Congress do not attempt to award judgment, nor to grant a new trial judicially; neither have they reversed a decree of this court; nor

attempted in any way to interfere with the administration of justice. Congress are here to all intents and purposes the defendants, and as such they come into court through this resolution and say that they will not plead the former trial in bar, nor interpose the legal objection which defeated a recovery before." 2 Ct.Cl., at 457-458 (emphasis in original).

The Nock court thus expressly rejected the applicability of separation-of-powers objections to a congressional decision to waive the res judicata effect of a judgment in the Government's favor.

United States v. Sioux Nation, 448 U.S. at 398 (boldface and italics added). Nock states very clearly the difference between a judgment and the "practical effect" of a judgment, for separation of powers purposes.

A similar analysis applies to Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856). In that case, Congress did not purport to affect the first judgment rendered after the initial decision by this Court. Id., 59 U.S. at 431. Congress did, however, nullify the "practical effect" of that judgment by legislatively decreeing that the bridge which this Court had held to be an obstruction of commerce was actually not an obstruction of commerce "in contemplation of law." Id. at 431.

This Court held the Act valid, since it was independently constitutional on other grounds. It was within Congress's power over the public right of navigation—part of the commerce power—to determine "what shall or shall not be deemed in judgment of law an obstruction to navigation." Id. This Court also distinguished a hypothetical money judgment: "Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court." Id. But that was not the situation in Wheeling & Belmont Bridge, and it is not the situation here.

C. Further Analysis And Conclusion

It is understandable that the Court of Appeals mistakenly equated modifying a final judgment (impermissible under the separation of powers),

with modifying the rights and obligations decreed by a final judgment (permissible if not independently unconstitutional on other grounds).

In most cases that are adjudicated to conclusion, especially cases involving private parties and final money judgments, the two modifications are equally impermissible. But that is not because there is any separation of powers problem with the latter modification. Rather, it is because the latter modification will be independently unconstitutional on other grounds; the Due Process Clause will protect the winning litigant from impairment of the private property rights decreed by the final judgment on the merits. This is nothing more than the "vested rights" argument addressed in Part I of this brief, applied correctly to final judgments on the merits.

Thus, the Court of Appeals was correct in stating that Congress could not "vacate[], reverse[], or otherwise disturb[]" a final judgment for a million dollars. Plaut, 1 F.3d at 1495. A judgment for a million dollars does "reassign property rights as necessary to satisfy the law." Id. Even if Congress does not vacate or reverse the judgment, it is still barred by the Due Process Clause from disturbing its effect in that situation—from reassigning the property rights already assigned by the valid judgment.

But not all judicial judgments "reassign property rights." For example, judgments on mere procedural grounds and not on the merits may only announce the court's refusal to hear a dispute. Such judgments are not *res judicata* and can be relitigated. No property rights are created by those judgments, as discussed in Part I above. The separation of powers would still bar Congress from passing a statute stating that such a judgment is vacated and void. However, neither Article III of the Constitution nor the Due Process Clause bars Congress from eliminating the procedural time bar and providing a forum for hearing the underlying claim on the merits.

The practical ramifications of these principles are fairly intuitive. They would include:

— If plaintiff P brought an action in federal court which was dismissed for failure to pay a filing fee, and Congress then passed legislation retroactively waiving the filing fee for plaintiffs in P's class, it would hardly be questioned that the defendant did not acquire permanent immunity based on the initial dismissal, and P could refile his action. Furthermore, if Congress passes a statute stating that actions which are dismissed for failure to pay a filing fee may be reinstated upon payment of the proper fee, the defendant also acquires no immunity from the original dismissal, and the statute is constitutional.

— If plaintiff X brought an action in federal court which was dismissed for want of jurisdiction because the jurisdictional statute momentarily lapsed through operation of a "sunset law," and Congress immediately thereafter reenacted the jurisdictional statute and X refiled his lawsuit, the federal courts would have jurisdiction to hear the claim on the merits. Compare Freeborn v. Smith, 69 U.S. (2 Wall.) 160, 174-76 (1865).

— Nation A, with which the United States is at war, sues a private party for breach of a prewar contract. The District Court enters judgment dismissing A's action, since A cannot sue in a federal court. See Ex Parte Colonna, 314 U.S. 510 (1942). Subsequently, a new head of state takes power, the war ends, and Congress provides that the federal courts have jurisdiction to hear A's claims. A can then refile. Compare Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380 (1829).

To sum up, Congress can grant jurisdiction and change substantive law, even if there has been a prior judicial decree. Any such prior decree must remain intact and must be respected for whatever rights and obligations (if any) it still requires. If Congress does that, its legislation conforms to the separation of powers, whatever its "practical effect." The legislation is then valid unless it is "independently unconstitutional on other grounds." Section 27A(b) conforms to these principles, and as is discussed in Part I above, it has no other constitutional infirmity.

Based on the foregoing, section 27A(b) does not violate the constitutional separation of powers.[11]

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11 In the view of *amicus curiae*, there is another important reason why section 27A(b) does not violate the separation of powers. Because it involves an area that has not yet been well explored by the courts, however, it is relegated to a textual footnote.

It is normally within the purview of Congress to legislate. U.S. Const., Art. I, § 1. "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*." Federalist 47, quoted in Plaut v. Spendthrift Farm, 1 F.3d at 1491 (emphasis in original).

However, the very nature of this Court's decision in Lampf was to act in a manner customary to a Legislature, by engaging in pure lawmaking. Time bars, after all, are called *statutes* of limitation. This Court has acknowledged that any statute of limitations is a creature of policy-making and legislation. Chase Securities Corp. v. Donaldson, 325 U.S. at 314; Campbell v. Holt, 109 U.S. at 628. In Lampf, this Court candidly recognized that it was engaging in "interstitial lawmaking" based on "federal policies . . . and the practicalities of litigation." Id., 111 S.Ct. at 2778 (quoting Reed v. United Transportation Union, 488 U.S. 319, 324 (1989)). Indeed, the Framers of our Constitution would probably have recognized creation of new statutes of limitation as solely an Article I power, since courts sitting at law were not in the business of creating new time bars in 1787.

There is nothing wrong with judicial legislation of itself. This Court has used the term "interstitial federal lawmaking" in describing judicial legislation to fill statutory gaps. United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973); see Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). Many decisions involving statutes of limitation for federal actions have been products of interstitial judicial lawmaking. See DelCostello v. International Brd. of Teamsters, 462 U.S. 151 (1983); Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987); United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973); Holmberg v. Armbrecht, 327 U.S. 392 (1946).

However, given that Lampf is pure judicial legislation, the argument against section 27A(b) seems to be that the judiciary acts competently under Article III by legislating a statute of limitations, an Article I power, but then Congress acts incompetently under Article I and violates the separation of powers by fixing an error in the judiciary's use of this Article I power. That makes little sense. It might instead be suggested that if any branch has wandered into the realm of another branch, it is the judiciary that has trespassed against the Legislature; by contrast, the Legislature has only legislated. If Congress violates Article III by exercising the "judicial power," then arguably the judiciary violates Article III by exercising the "legislative power." Even if not, Congress should not be held to violate any separation of powers by amending legislation with more legislation.

While amicus believes this analysis is correct, he recognizes that the area of judicial legislation has not been well explored insofar as it pertains to the relations between the judiciary and Congress. As a result, he has not taken up much space with this discussion, but rather has focused this Part on arguments from Hayburn's Case. Nonetheless, the whole

(continued...)

III. A New Statute Of Limitations Depriving A Hearing For Parties Whose Claims Were Timely When Filed Violates The Due Process Clause, And Congress Violates No Constitutional Laws By Overriding Such A Constitutionally Infirm Time Bar

Amicus curiae has addressed the arguments commonly made in cases attacking the constitutionality of section 27A(b). In the view of *amicus*, however, there is a simpler reason why section 27A(b) violates no constitutional laws: The District Court's dismissal of this case *itself* violated the right to a hearing under the Due Process Clause, by barring claims that were timely when filed. Providing a hearing that was denied in deprivation of fundamental due process cannot violate the Constitution.

The procedural posture of this argument is unusual, for it requires this Court to recognize the District Court's retroactive application of the new Lampf time bar was unconstitutional. Nonetheless, this Court has never squarely addressed the constitutionality of applying Lampf retroactively to bar claims that were timely when filed. See Lampf, 111 S.Ct. at 2786 (O'Connor, J., dissenting).

It should do so now. If the District Court's dismissal of the shareholders' action was unconstitutional, then it would be unnecessary for this Court to decide the constitutionality of section 27A(b), since Congress cannot have violated the Constitution by removing the unconstitutional effects of judicial decisions. "This Court will not pass upon the constitutionality of an act of Congress where the question is properly presented unless such adjudication is unavoidable . . . ." United States v. Hayman, 342 U.S. 205, 223 (1952). Such adjudication is not unavoidable here. Alternatively, since the grant of certiorari addresses two constitutional questions, acceptance of this argument would simply render section 27A(b) constitutional on both grounds.

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[11](...continued)
point of this Court's current retroactivity jurisprudence is to *prevent* judicial legislation, and to implement the views of the late Justice Harlan that decisions of this Court not be "the commands of a super-legislature." Desist v. United States, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting), or based on policy considerations "that are appropriate enough for a legislative body." Mackey v. United States, 401 U.S. 667, 677 (1971) (Harlan, J., concurring in the judgment). Thus, the issue should be worth a further look. Many similar concerns were raised in Justice Stevens's dissent in Lampf, 111 S.Ct. at 2783-85.

A further discussion of "judicial legislation" as it relates to Lampf and the argument in this footnote may be found in "Prospective Application," 24 Pac. L.J. at 375-79.

A number of decisions from this Court make clear that if *Congress* had enacted a new limitations period on June 20, 1991 and applied it retroactively to bar pending claims that had been timely when filed, Congress would have violated a party's right to due process of law by depriving it arbitrarily of a right to be heard in court. A legislature cannot adopt a new, shortened limitations period without at least providing a reasonable period in which affected parties may bring their existing claims.

A typical statement of these principles—among the many by this Court—may be found in Wilson v. Iseminger, 185 U.S. 55 (1902):

> It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the court. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily . . . It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action.

Id. at 62. Wilson was a case in which the legislature did provide a reasonable time after enactment of a new statute for bringing existing causes of action; there have been others as well. See, e.g., Terry v. Anderson, 95 U.S. (5 Otto) 628, 632-33 (1877).

This Court has used the "reasonable time" doctrine to avoid construing new statutes of limitation so as to bar existing claims without any time in which to bring the action. Such a construction was necessary to avoid unconstitutional results:

> When a statute declares generally that no action, or no action of a certain class shall be brought, except within a certain limited time after it shall have accrued, the language of the statute would make it apply to past actions as well as to those arising in the future. But if an action accrued more than the limited time before the statute was passed a literal interpretation of the statute would have the effect of absolutely barring such action at once. **It will be presumed that such was not the intent of the legislature. Such an intent would be unconstitutional.**

Sohn v. Waterson, 84 U.S. (17 Wall.) 596, 599 (1873) (boldface and underlining added). Other decisions of this Court have also construed new

limitations periods to provide for a "reasonable time" in which to maintain existing causes of action. See, e.g., Union Pacific Ry. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 202 (1913); Ochoa v. Hernandez y Morales, 230 U.S. 139, 154, 161-62 (1913).

None of these decisions has ever been overruled, and there is nothing to suggest they are anything other than good law. See Block v. North Dakota, 461 U.S. 273, 286 n.23 (1983); Texaco, Inc. v. Short, 454 U.S. 516, 527 n. 21 (1982).

The Due Process Clause protects against arbitrary action by government. Daniels v. Williams, 474 U.S. 327, 331 (1986) (quoting Hurtado v. California, 110 U.S. 516, 527 (1884)). This means arbitrary action by any branch of government, be it legislative, executive or judicial. See also Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680 (1930) [guarantee of due process extends "to state action through its judicial as well as through its legislative, executive, or administrative branches of government"]; Ownbey v. Morgan, 256 U.S. 94, 110-11 (1929) (same). There are "constitutional limitations on the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958).

Thus, if it is unconstitutional for the legislative branch to implement a defense—such as a statute of limitations—so as to wipe out existing claims arbitrarily, it can be no more constitutional for a nonlegislative branch to implement a defense so as to wipe out existing claims arbitrarily. And the federal judiciary is not exempt from the Due Process Clause. This Court has held that a construction of law in a judicial decision can act as an arbitrary deprivation of a right to be heard, and consequently as a denial of due process of law. Brinkerhoff-Faris Trust v. Hill, 281 U.S. at 679.

Unless cases such as Wilson v. Iseminger are to be repudiated, one can only conclude a judicial decision also violates the Due Process Clause, if it does what those cases held Congress could not do. It violates due process for any branch of government to create a new limitations period without providing for a reasonable time in which to prosecute existing causes of action, or to bar causes of action that were timely when filed. The Due Process Clause does not apply to Congress alone.

Wilson v. Iseminger should be particularly applicable to this case. When the shareholders filed their lawsuit on November 25, 1987, the law uniformly looked to the limitations period of the most analogous forum

state action for section 10(b) claims. See, e.g., Herman & MacLean v. Huddleston, 459 U.S. 375, 383-84 & n.18 (1983); Silverberg v. Thomson McKinnon Securities, Inc., 787 F.2d 1079 (6th Cir. 1986). For section 10(b) claims in federal court in Kentucky, the Kentucky blue sky period applied—three years, which could be tolled by fraudulent concealment. Herm v. Stafford, 663 F.2d 669 (6th Cir. 1981). There was nothing to the contrary in November 1987. But everything started changing on April 8, 1988—4 1/2 months *after* the shareholders filed suit—with the Third Circuit's decision in In re Data Access Systems Securities Litigation, 843 F.2d 1537 (3d Cir. 1988) (en banc), cert. denied, 488 U.S. 849 (1988).

Furthermore, assuming these shareholders could have found a crystal ball to anticipate a later judicial sea change in the limitations period, they would have needed a second crystal ball to anticipate it would be applied retroactively to them. Before their action was filed, well over a century of precedent, culminating in this Court's decision in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), would have operated to foreclose such an argument in a civil case. Even this Court's seminal 1987 decision in the area of criminal retroactivity, Griffith v. Kentucky, 479 U.S. 314 (1987), stated that civil retroactivity "continues to be governed by the standard announced in Chevron Oil Co. v. Huson." Griffith, 479 U.S. at 322 n.8.

Shortly before this action was filed, this Court again decided whether a new statute of limitations would apply retroactively to bar an action that was timely when filed. This Court unanimously held it would not, following Chevron Oil. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 608-09 (1987). Saint Francis College and Chevron Oil were the settled law of retroactivity of new time bars when this case was filed.

A simple application of Wilson v. Iseminger leads to the conclusion that the District Court's deprivation of the shareholders' right to be heard on their federal antifraud claim, based on a new limitations period that "came from nowhere" and instantly barred claims which were timely when filed, violated the shareholders' right to due process as an arbitrary extinguishment of the right to be heard. It does not matter that the source of the due process violation was a federal court of law; the action was a due process violation nonetheless. Many of these points were also made by Justice O'Connor in her Lampf dissent, 111 S.Ct. at 2785-88.

Obviously, neither this Court nor any other federal court would advertently violate the Constitution that its most solemn duties are to interpret and uphold. Nonetheless, the retroactive application of Lampf to

bar claims that were timely when filed was drastic, harsh and manifestly unfair to parties who had no idea of what was coming.

The shareholders were among those parties. The District Court's retroactive application of the new Lampf time bar was an arbitrary and unconstitutional deprivation of their right to be heard on their federal antifraud claim. There can have been no constitutional prohibition against Congress providing a hearing that had been unconstitutionally denied.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Dated this 20th day of July, 1994.

Respectfully submitted,

MICHAEL B. DASHJIAN
3161 Bechelli Lane Suite 202-B
Redding, California 96002
Telephone: (916) 221-8900
Counsel for Amicus Curiae